JUSTICE ON THE SLAUGHTER-BENCH:
THE PROBLEM OF WAR GUILT
IN ARENDT AND JASPERS

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There is only one rational way in which states co-existing with other 
states can emerge from the lawless condition of pure warfare. . . . [T]hey 
must renounce their savage and lawless freedom, adapt themselves to 
pub-
lic coercive laws, and thus form an international state (civitas gentium).

Passions . . . respect none of the limitations which justice and morality 
would impose on them. . . . When we look at . . . the consequences of 
their violence. . . ; when we see the evil, the vice, the ruin that has befall-
en the most flourishing kingdoms. . . , we can scarce avoid being filled 
with sorrow at this universal taint of corruption. . . , regarding History as 
the slaughter-bench at which the happiness of peoples, the wisdom of 
States, and the virtue of individuals have been victimized. . . .

This article develops a meta-ethical inquiry into the nature and possibility of 
international justice. It sees the understanding of such justice as caught between

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1. Immanuel Kant, Perpetual Peace: A Philosophical Sketch, in Political Writings 105 


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all requests for permission to photocopy or reproduce article content through the University 
two poles. On one hand, there is a naively optimistic vision of its possibility in a world of nation-states and power politics; on the other, an overly reductive and pessimistic account of justice as only that of the victor. The ethical truth lies between these two positions, in an aporetic middle ground. The article addresses its concerns by constructing a debate between Hannah Arendt and Karl Jaspers out of their different positions in Arendt’s Eichmann in Jerusalem and Jaspers’s The Question of German War Guilt. It begins by identifying a conflict in Arendt’s account of war guilt in the Eichmann trial, between her support for the possibility of international criminal justice and her view that an ethical community of judgment cannot be constituted for the defendant and others like him. It then seeks a way of addressing this conflict through a critical reading of Jasper’s account of metaphysical guilt in the context of his ambivalence towards collective guilt. Thinking of the ethics of justice in Jasper’s metaphysical terms does not, however, lead to an easy solution to Arendt’s problem of the justification of an international criminal justice. What emerges rather is an uneasy relationship between the legal and the ethical, where the latter both draws on and disturbs legal categories.

I. JUSTICE ON THE SLAUGHTER-BENCH

If Hegel is right about the “slaughter-bench” of history, what does this mean for our understanding of justice for acts of wrongdoing, even of the worst kind? On his description, humankind’s destiny is to reproduce time after time, by both the judge and the judged, the most terrible excesses. In such a situation, what can the ethical status of justice be? Can endless, systemic, acts of egregious violence be requited morally where nothing is learned and nothing in essence changes? In such a light, does justice not appear as vain repetition and false consolation, as the illusion practiced by the barbaric victor over the vanquished? Writing in the 1820s, Hegel retained a redemptive optimism, suggesting that even if we regard history as the slaughter-bench, “the question involuntarily arises—to what principle, to what final aim these enormous sacrifices have been offered.” For him a path of progress, a reason beyond the unreason, could be discerned. Two hundred years later, having experienced horrors that might have

3. Id.
4. Id. at 21.
given even him pause for thought, is there any consolation through principled justice for history’s slaughter-bench?

Such a question will find lawyers reaching for the international statute book. They will point to the recent establishment of an International Criminal Court, and the creation of individual tribunals with regard to the former Yugoslavia and the genocide in Rwanda. Things surely have changed for the better, in line with another Enlightenment account, that first outlined by Kant in his essay on “Perpetual Peace.” For him, savagery and lawlessness could be avoided by an international state and laws, and it will be argued that these new institutions represent a step in the right direction. They produce the hope, and something of the reality, of a new international justice that can stand against history’s slaughter-bench. But ethically, what kind of justice do these new institutions deliver? If new outrages continue after their establishment, do they become convenient ways of assuaging guilty consciences, while operating as part of a world order in which genocidal actions continue, in part because of the alibi that “something is being done”? In such a light, to what extent do they themselves become complicit, delivering a “victor’s justice” for successful warmongers, prosecuting those who find themselves on the wrong end of global power relations?

The bite of such questions depends on how we understand the justice that international institutions are able to deliver, and in this essay, I consider two works, written in dialogue with each other, which can fairly lay claim to have been the first to have addressed the problem of justice “on the slaughter-bench” in modern times: Hannah Arendt’s *Eichmann in Jerusalem* and Karl Jaspers’s *The Question of German War Guilt*. Both Arendt and Jaspers saw serious problems in delivering a morally valid international justice. For both, the moral categories that would vindicate such a justice were found wanting in the face of the Nazi slaughter-bench. In Arendt, this is seen especially at the end of the epilogue and in the postscript to *Eichmann in Jerusalem*, where her support for international penal law runs up against the problem of doing justice to one so egregiously wicked, yet so unexceptional, as Eichmann. In *The Question of German Guilt*.

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5. Kant, supra note 1. Kant did not think it possible to go so far as this, but he provided a blueprint for subsequent thinking and practice.


Guilt, it is seen in Jaspers’s troubled reflections over the effect of his own guilt typology in allowing Germans to evade a proper sense of their guilt for Nazi crimes, and in particular in his deep ambivalence to a conception of collective guilt. However, I will argue that there is more to be said ethically for international justice than their arguments allow. There is much to be said for accepting the slaughter-bench view of history,8 but for still accepting something of a sense of moral justice delivered by international tribunals. Arendt and Jaspers in different ways confront the same problem, but I argue that there are resources in the latter’s philosophy, in his metaphysical conception of justice. These can be pressed into service against his own main argument, and they can also help resolve Arendt’s difficulties. It is not an easy moral conception of justice that emerges, rather one that is troubled and troubling, but it gives sense to the feeling that a wholly reductionist account of international justice can be avoided.

The essay has five sections. In the next, I clarify the issue that lies at the heart of my argument, and of Arendt and Jaspers’s positions in their early epistolary exchange on Nuremberg. This was triggered by Jaspers’s book on German war guilt published at the end of the war, and the issue was later pursued by Arendt in her discussion of the Eichmann trial. I will consider Arendt’s contradictory position in Eichmann in Jerusalem and the problem with Jaspers’s position in The Question of German Guilt in the two ensuing sections. In the final sections, I draw the threads of the argument together by picking up the tension in Jaspers’s account concerning collective guilt and showing how it might be exploited in a way that holds out something for the ethical promise of international justice. I focus on the nature and implications of his idea of “metaphysical guilt” in its relationship to collective guilt and counterpose it to the idea of history as the slaughter-bench.

In considering Arendt and Jaspers, I draw to an extent upon themes that I have developed in other work on the relationship between the historical and structural forces shaping modern society and the nature of its ethical forms. In particular, I have argued that modern thinking about justice discloses a strongly antinomial structure, and this is seen for example in the

8. There is an alignment between the slaughter-bench view and Arendt’s depiction of the violence associated with modern imperialism and totalitarianism, and her understanding of the problem of dealing with the Nazis as “civilized barbarians.” Similarly, Jaspers’s guilt categories are implicitly cut in the light of the need to reconstruct a society that had previously given itself up to the slaughter-bench.
relationship posited between “individual” and “social” justice, or between (what become constructed as) “legal” and “moral” forms of guilt. Here I prefer to move by way of immanent critique from the problems I find in Arendt’s and Jaspers’s work. I will, however, in the final sections sketch a “difficult” relationship between legal and ethical justice in the area of international justice, which draws on my previous work on the relationship between “the conditional” and “the unconditioned” in modern ethics. This links up with my interest in the relation between an ideal, displaced ethics and the nature of law in modernity, showing some affinity with Jacques Derrida’s view of justice as deconstruction, while drawing on Roy Bhaskar’s critical realist account of dialectic. The result is a conception of guilt or responsibility that delivers a sense of justice, albeit in a difficult form.

II. JUDGMENT AND JUSTICE: THE PROBLEM OF MORAL COMMUNITY

“still, there is a difference. . . .”

An initial question concerns what we mean by justice in a penal context. In the classical theory of the nation-state, institutions of criminal justice stand against violence in two ways. First, they seek to prevent it (re)occurring by

9. The latter distinction lies at the core of Jaspers’s philosophy. For accounts of the antinomial structure of the philosophy of criminal justice and legal doctrine, see Alan Norrie, Law, Ideology and Punishment (1991); Alan Norrie, Punishment, Responsibility and Justice (2000); Alan Norrie, Crime, Reason and History (2d ed. 2001). For antinomialism in legal theory more generally, see Alan Norrie, Law and the Beautiful Soul pts. 1–2 (2005).


conviction and punishment which deters further such acts. As in the national context, the deterrent effect of international criminal justice is unproven, and perhaps will remain unprovable, but there is a second goal of justice which is more important. That is the delivery of a sense of retributive justice by the capture, prosecution, and conviction of those who have done wrong and who are held to account for their acts before a justice that condemns, and in condemning, declares the moral negation of the criminal act. How capable are international criminal justice institutions of delivering this most central understanding of what justice is? To what extent, in terms of our initial quote from Hegel, can they deliver a moral condemnation of wrongdoing, which stands as a human achievement, over against the vision of human history as a “slaughter-bench”?

Before proceeding to Arendt and Jaspers on this question, I briefly explore a problem in the theory of punishment discussed in relation to national penal justice contexts. This links, I will suggest, with Arendt and Jaspers’s early epistolary exchange on justice at Nuremberg, setting up the ensuing positions. The problem hinges on the difficulty in creating a consensual community of judgment under modern social conditions.

A. The Need for a Community of Judgment

The problem I have in mind has classical reference points in both Kant and Hegel. With Kant, it is seen in the issue of doing justice to the mother who kills her illegitimate child, or the soldier who kills in a duel. In these cases, “honor” killings, there is a problem in justly punishing the wrongdoer for murder. After some deliberation, Kant holds that the moral law remains in force in such cases but that legislation and the civil constitution represent a real underlying problem. So long as there is conflict between honor and the penal law, the civil constitution will remain “barbarous and underdeveloped” and be “to blame for the fact that the motives of honor obeyed by the people are subjectively incompatible” with the objective law, “so that public justice as dispensed by the state is injustice in the eyes of the people.” In Hegel’s case, there is a similar problem concerning criminal justice and poverty. Private property is of course one of

the foundations of his *Philosophy of Right*, but the built-in dynamic in modern society towards impoverishment of those at the bottom of society leads poverty to “take the form of a wrong done to one class by another,”14 and there is a consequent “loss of the sense of right and wrong” amongst the poor, who consequently become a “penurious rabble.”15

These comments by Kant and Hegel point in the same direction, to the erosion or displacement of a sense of right and wrong in society, to a sense that society’s condition leads to a loss of moral compass or consensus within a community, and to a resultant threat to moral judgment. The comments could be interpreted in two ways. One would be to see a loss of a *subjective* moral grip on the individuals concerned—the mother, the soldier (Kant), the poor (Hegel). These people are not really to blame for failing to obey the law because of their circumstances. The other would be to see a loss of *objective* moral purchase on the situation. It is not so much that individuals are to be excused by their subjective circumstances for failing to obey the law, but rather that the law has objectively lost its moral claim to validity. The civil constitution (Kant), or the dispensation of property (Hegel), are no longer justified by the overall circumstances in which they operate (ignorance, poverty). Social development has generated a moral position in which a common sense of right and wrong cannot exist, and such a common sense is just what would be needed for justice and judgment to occur. Justice requires, in short, a common framework within which the judge and the judged coexist.

These two aspects of the problem—its subjective and objective dimensions—are, I would suggest, integral to any modern discussion of guilt and punishment, justice and judgment. In addition to the philosophy of punishment,16 they are seen, for example, in modern legal accounts of (subjective) excuse and (objective) justification.17 It is the objective dimension

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15. Id. at 150.
16. C.f. R.A.Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, 20 Crime & Just. 1 (Michael Tonry ed., 1996) (Punishment is unjustified where offenders have not “wronged members of a genuine community . . . that respects and cares for them, and that thus has the moral standing to criticise them.”). See also infra notes 26, 64.
that I think is the more significant in its implications for the debate between Arendt and Jaspers, though both come out in Arendt’s writings. Let us now turn, however, to examine the early exchange between the two over Jaspers’s book on German war guilt in the light of this problem of judgment.

B. An Epistolary Exchange

As we will see in detail below, Jaspers’s *The Question of German Guilt* established a fourfold typology of forms of guilt: he wrote of *criminal*, *political*, *moral*, and *metaphysical* guilt, from which he distinguished a fifth form, *collective* guilt. We will have cause to consider the link between his typology and this fifth form later, but for the moment, we need only note that Jaspers’s schema provided a means for distinguishing those who had led the Nazi war machine, who were *criminally* guilty, from the bulk of the population who suffered political sanctions (and therefore responsibility—*political* guilt—as members of the German polity). In this typology, *moral* and *metaphysical* guilt are deeper forms which affect the individual’s ethical rather than legal or political position, and work in foro interno, while *criminal* and *political* guilt work in foro externo. Jaspers erects a barrier between internal and external forms of guilt, though he acknowledges, without developing, the sense that these are ultimately connected.

Whatever the implications of this typology, one thing is clear: Jaspers identified what was for him a valid form of criminal guilt which vindicated the isolation and punishment of the most egregious Nazi war criminals.

Arendt’s response in correspondence was to question this situation given the nature of national socialism:

> The Nazi crimes . . . explode the limits of the law; and that is precisely what constitutes their monstrousness. For these crimes, no punishment is severe enough. . . . That is, their guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems. . . . We are simply not equipped to deal, on a human, political level, with a guilt that is beyond crime. . . . The Germans are burdened now *with thousands or tens of thousands or hundreds of thousands of people* who cannot be adequately punished within the legal system.  

Her letter prompted a warning from Jaspers that she was close to describing “a guilt that goes beyond all criminal guilt [which] inevitably takes on a streak of ‘greatness’—of satanic greatness,” whereas it was necessary “to see these things in their total banality, in their prosaic triviality, because that’s what truly characterises them.” Replying, Arendt accepted that her words might have invited this understanding, but that she totally rejects such a view, and that she was in fact trying to make a different point:

But still, there is a difference between a man who sets out to murder his old aunt and people who without considering the economic usefulness of their actions at all . . . built factories to produce corpses . . . [I]ndividual human beings did not kill other individual human beings for human reasons, but . . . an organised attempt was made to eradicate the concept of the human being.

Arendt’s comments can be aligned with the problem we have identified in Kant and Hegel, both in its subjective and objective dimensions. Subjectively, she is arguing that the Nazis had fallen below a level of normal human intercourse, had developed a wholly distorted sense of right and wrong, had carried out acts only attributable to persons who had lost essential elements of their humanity. There was something just lacking in their moral psychology, something psycho- or socio-pathological in their actions, which made them unpunishable according to modern moral-legal protocols. Later, she would follow up such a view in her account of Eichmann’s limited, though normal, personal moral capacities, and in

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20. Id. at 62.
21. Id. at 69.
22. I use the terms “objective” and “subjective” to denote the two dimensions in the liberal theory of punishment (i.e., the need for a judging community and a responsible subject) required for justice. In Eichmann in Jerusalem, Arendt uses the terms slightly differently, arguing that where the “subjective” dimension of guilt is missing, only an “objective” justification of punishment is possible, meaning a non-liberal “Old Testament” form of justice. Arendt, supra note 6, at 277–78. In order to avoid confusion and preserve the important point that a liberal account itself involves an “objective” dimension, i.e., an emphasis on the need for a community of judgment which can engage with the individual subject(ivity), I have tried to avoid the terms “subjective” and “objective” in describing Arendt’s position below, but see infra p. 202.
23. In Eichmann in Jerusalem, she writes that the nub of the problem was to understand that “an average, ‘normal’ person, neither feeble-minded nor indoctrinated nor cynical, could be perfectly incapable of telling right from wrong.” Arendt, supra note 6, at 26.
her account of the modern “mass man,” but I do not think this is the most important aspect of her argument. Abutting the subjective dimension is the problem that, objectively, Nazi Germany had established a system of government in which a common, modern, liberal understanding of right and wrong had disappeared. A whole people, or at least a huge chunk of it, had redirected their moral compass radically and abhorrently. Nuremberg was an attempt to restore the sense of a common moral framework, which could unite judge and judged in a system of justice, but it grappled with the fact that the Nazis did not share the same assumptions as those judging them. There was an absence of a sense of shared moral community or consensus, and this called into question the possibility of justice in Arendt’s view.

Comparing Arendt’s problem with the Nazis with those identified in national contexts by Kant and Hegel, there are of course important differences. In the latter cases, the problem is that the liberal understanding of law is exposed by the failure of liberal society to provide the social arrangements which would sustain it. In Arendt’s case, liberal society has paved the way for a totalitarian polity which does not share its (proclaimed) values. But in all cases, we have the idea that a common set of values that can unify a community of judgment has been subverted by underlying social developments. It would be injustice to punish the maternal infanticide or the duelist (Kant), or the criminal pauper (Hegel). Surely it could not also be injustice to punish the Nazi? Of course, Arendt has no sympathy for such people (as she might have had, let us say, for the mother or the pauper), but sympathy, or antipathy, are not at issue. The question of justice is raised because Arendt senses the loss of a crucial element required for any modern system of justice. There is a radical disjuncture between the morality by which the person is judged and the beliefs on which they acted. Justice requires a common normative order so that if the judged do not, at some level, share the basic precepts by which they are judged, then they may be

Cesarani has argued that Eichmann was indoctrinated in anti-Semitic ideas, which he embraced, and he attacks the theory of totalitarianism which underpins Arendt’s assertion to the contrary. David Cesarani, Eichmann: His Life and Crimes 361–63 (2004). As I indicate below, infra note 60, I do not think that Cesarani’s criticisms of Arendt affect the problem of judgment and justice with which I engage here.

25. This anticipates the position Arendt develops in her Origins of Totalitarianism. Id.
sanctioned, but they may not be justly punished. There can be no moral dialogue between the judge and the judged where the actions and views of the latter place them so far beyond the moral pale that they are also beyond the possibility of judgment, as expressed in the form of law. That is Arendt’s concern in these letters, and in her subsequent writing on the trial of Eichmann, she returned to it. In the next section, we consider the fuller development of this argument in *Eichmann in Jerusalem*.

III. THE PROBLEM OF JUDGMENT AND JUSTICE FOR EICHMANN

“There is a normative ‘melancholia’ in Hannah Arendt’s work.”

In this section, I consider Arendt’s reflections on the Eichmann trial, as developed in the epilogue and postscript to *Eichmann in Jerusalem*. Initial perusal of the epilogue may provoke doubt as to my claim as to Arendt’s position. For the most part, she seems to eschew the above concern about the possibility of justice. The epilogue indeed, for most of its length, takes the form of a defense of the Eichmann trial against claims that it lacked justice. The trial is placed in a line that includes Nuremberg and the postwar “successor trials” in various countries. These, she proposes, disclose a trajectory precisely towards a more complete form of international criminal justice, not an ethical logic against its possibility. Where she acknowledges criticisms of the Eichmann trial, these are generally presented as

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26. In a later essay on the German Auschwitz trials of the 1960s, Arendt describes the practical outcome of this theoretical impasse: “Only one of the defendants . . . does not show open contempt for the court, does not laugh, insult witnesses, demand that the prosecuting attorneys apologise, and try to have fun with the others.” Hannah Arendt, *Auschwitz on Trial*, in Responsibility and Judgment 227, 234 (Jerome Kohn ed., 2003). Of course, many people are punished by law for crimes with which they morally disagree. Problems of moral community come to the fore where the disagreement is structural in a society, systematic, or maintained by a whole class of persons, and especially, as in the case of the Nazis, when the crime in question is egregious.


negative *faute de mieux* juridical consequences of the absence of an all-encompassing international justice. In their formalism, or the absence of alternatives, they are not to be taken too seriously. However, the possibility of achieving an ethical order of international justice is undermined in the closing pages of the epilogue, and also in the later postscript. In both places, it is the possibility of a community of judgment as the foundation for the moral and legal legitimacy of criminal justice that is called into question. I shall suggest that in *Eichmann in Jerusalem*, it is the failure of a community of judgment that contributes to the sense of “normative melancholia” that Seyla Benhabib finds in Arendt’s account, and I return to this point at the end of this section.\(^29\)

**A. Towards an International Criminal Court**

I begin, however, with Arendt’s initial arguments, which support the internationalization of criminal justice. Many complaints were leveled at both the trial of Eichmann and of the leading Nazis at Nuremberg, but Arendt’s response to these is generally unsympathetic. The main argument she confronts is that, in both trials, the defendants were exposed to a retroactive law in the court of the victors. She responds that the charge of retroactivity applies meaningfully only to acts known in advance to the legislator, and not to new crimes like genocide, which suddenly appear and require a judgment according to a new law.\(^30\) For lawyers, there is something instinctively problematic in this, but Arendt opposes arguments based simply on “legalistic” premises: there are other, more substantive, issues to weigh in the balance against formalistic complaints based on the rule of law.\(^31\) She also argues that of the three main heads of crime tried at Nuremberg, “crimes against peace,” “war crimes,” and “crimes against humanity,” only the last was really new and unprecedented, and it was the one the judges felt least comfortable to use.

This observation deserves further exploration. In Arendt’s account, Nuremberg negotiated an uneasy path between conflicting problems. The first two categories of crime were vulnerable to criticism on the basis that

\(^{29}\) Benhabib, supra note 27.

\(^{30}\) Arendt, supra note 6, at 254.

\(^{31}\) For example, with regard to the kidnapping of Eichmann in Argentina, “the realm of legality offered no alternative.” Id. at 264.
the allies, who had set up the tribunal, were themselves guilty of such crimes. This is the \textit{tu quoque} argument: that the Russians had themselves attacked Finland and divided Poland, that the Americans had dropped the atomic bomb on Hiroshima and Nagasaki, that more generally modern war conducted by any party does not separate soldier and civilian. Accordingly, there was an incentive to distinguish Nazi guilt by focusing on those crimes carried out during the war where “gratuitous brutality” or “a deliberate inhuman purpose could be demonstrated.”\textsuperscript{32} However, this led to the most radical and novel criminal charge at Nuremberg, the “crime against humanity,” which in principle had nothing to do with existing war crimes. Such a crime was “in fact independent of the war,” involving “a policy of systematic murder to be continued in time of peace.” It took as its focus “the blotting out of whole peoples, the ‘clearance’ of whole regions of their native population.” It involved, most importantly, a “crime against the human status.”\textsuperscript{33} This presented the authorities with a dilemma. On one hand, the “crime against humanity” was the one crime to which the \textit{tu quoque} argument did not apply,\textsuperscript{34} and this made it ostensibly an attractive basis for prosecuting the Nazis. On the other, this was the charge with which the court was least comfortable on account of its novelty, and the judges preferred to convict on the more traditional war crimes. Yet, when it came to sentence, the hardest punishments were meted out to those defendants who were in fact most guilty of those atrocities best described as “crimes against humanity.” The court resolved its legal dilemma in terms of the criminal categories at the sentencing stage where more discretion was available to it.

The Nuremberg Tribunal was in short caught between a legalistic desire to confine guilt to the more orthodox forms of war crime, and a need to recognize the specific suffering of the Jewish people. Without a crime to

\begin{itemize}
\item \textsuperscript{32} Id. at 256.
\item \textsuperscript{33} Id. at 257.
\item \textsuperscript{34} Id. at 255–57. This is questionable if one thinks, for example, of the genocides carried out on the American Indians and on indigenous peoples in Africa, Australia, and South America. Lawrence Douglas has shown that the circumscription of crimes against humanity by crimes of war or against the peace in the Nuremberg Charter and at the Tribunal was designed to protect the general sovereignty of states and to avoid the \textit{tu quoque} argument from spreading into the area of crimes against humanity. Lawrence Douglas, The Memory of Judgment 48–53 (2001).
\end{itemize}
reflect the latter, it would have been impossible to encompass the Germans’ mass murder of their own Jewish nationals.35 Nuremberg was a hesitant first effort at a trial of a new type. As such it raised issues of a formal, legalistic kind, but its real ethical and juridical significance was that it introduced the idea of a “crime against humanity.” It recognized a prototype of a new form of crime, one that was worse than any single atrocity:

It was when the Nazi regime declared that the German people not only were unwilling to have any Jews in Germany but wished to make the entire Jewish people disappear from the face of the earth that the new crime, the crime against humanity . . . appeared. . . . [G]enocide . . . is an attack upon human diversity as such, that is, upon a characteristic of the “human status” without which the very words “mankind” or “humanity” would be devoid of meaning.36

Turning from Nuremberg to Eichmann, this observation casts light on certain problems associated with the latter. From one point of view, trying Eichmann in Jerusalem presents no problem. It is rather like trying Nazi war criminals in Poland or Czechoslovakia for crimes committed in those countries. It “was in actual fact no more . . . than the last of the numerous Successor trials which followed the Nuremberg trials.”37 But the identification of a new kind of crime against humanity suggests the need for a new kind of tribunal. While a Jewish state could in Arendt’s view try crimes against Jewish people,38 the idea of a crime against humanity makes it clear that this is a universal crime, one against the status of being human, that is perpetrated on a particular group, “the body of the Jewish people.” Insofar as we have a crime against Jews, there is no reason why a Jewish state should not try it, but insofar as we have a crime against humanity perpetrated on Jews, there is the need for “an international tribunal to do justice to it.”39 Building on Nuremberg, which established the “crime against humanity,” Eichmann points to the need for an institutional progression in international penal law. In the absence

35. Arendt, supra note 6, at 258.
36. Id. at 268–69.
37. Id. at 263.
38. Id. at 259–60. But see Benhabib’s argument that this collapses questions of national identity and political citizenship. Benhabib, supra note 27, at 77–78.
39. Arendt, supra note 6, at 269.
of such a progression, it lacked the form adequately to reflect the wrongdoing of the Nazis:

These modern, state-employed mass murderers must be prosecuted because they violated the order of mankind, and not because they killed millions of people. Nothing is more pernicious to an understanding of these new crimes, or stands in the way of the emergence of an international penal code that could take care of them, than the common illusion that the crime of murder and the crime of genocide are essentially the same, and that the latter therefore is “no new crime properly speaking.” The point of the latter is that an altogether different order is broken and an altogether different community is violated.40

In sum, Arendt points here to the logic immanent from Nuremberg to Eichmann in favor of a new kind of crime, to reflect a new kind of wrongdoing, and to be tried under a new kind of tribunal. The thrust of these arguments is for an international legal order which includes an international criminal court, and Arendt seems to anticipate no ethical obstruction to this progression. However, we now come to the final part of her epilogue, in which she does raise such a problem.

B. The Problem of Justice

In the last four pages of the epilogue, Arendt picks up the theme that had animated her earlier correspondence with Jaspers. She begins by referring to the “conspicuous helplessness the judges experienced when they were confronted with the task they could least escape, . . . of understanding the criminal whom they had come to judge.”41 The problem was that there were so many like him, who were “neither perverted nor sadistic,” but were rather “terribly and terrifyingly normal,” and this was more terrifying “than all the atrocities put together.” It implied that “this new type of criminal . . . commits his crimes under circumstances that make it well-nigh impossible for him to know or to feel that he is doing wrong.”42 This fact undermines the assumption on which modern criminal justice occurs,

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40. Id. at 272 (emphasis added).
41. Id. at 276.
42. Id.
that there must be a subjective element of recognizing wrongdoing before any criminal can be convicted:

Foremost among the larger issues at stake in the Eichmann trial was the assumption current in all modern legal systems that intent to do wrong is necessary for the commission of a crime. . . . Where this intent is absent, where . . . the ability to distinguish between right and wrong is impaired, we feel no crime has been committed.43

Arendt points here to the need for a sense of wrongdoing in the accused, and she asks what is to be done when an Eichmann, together with a substantial section of an entire people, lacks it. It is true that the Nazis tried to cover up what they had done, but this was an admission of defeat rather than wrongdoing: “Would any one of them have suffered from a guilty conscience if they had won?”44 When Eichmann aligned his conduct with a Kantian sense of duty,45 that is, claimed he had acted as a moral person according to his own lights, he placed himself beyond the comprehension of his judges, who could not believe that an “average, ‘normal’ person . . . could be perfectly incapable of telling right from wrong.”46 It is for this reason that Arendt suggests that any justification for executing Eichmann must fall short of modern ethical expectations for justice. While a modern moral sensibility refuses what we might call an “Old Testament” sense of vengeance as a sufficient basis for punishment, and indeed considers it “barbaric,” just such a rationale has to underlie his execution.47 Justice at Jerusalem meant addressing the defendant in terms of a “premodern,” biblical understanding that “guilt and innocence before the law are of an objective nature, and even if eighty million Germans had done as you did, this would not have been an excuse for you.” The court was only

43. Id. at 277. In strictly legal terms, at least Anglo-American ones, Arendt is wrong, for there is a strong tendency to seek to separate legal from moral issues, to seek to distinguish questions of “cognitive” or “factual” from “moral” intent or guilt. Arendt is nonetheless right to point to the underlying moral relation that modern legal systems generally assume between criminal and moral wrongdoing, at least for the more serious offenses. Since her general point is not about law, but about the need for criminal punishment to be morally appropriate, her argument stands.
44. Id. at 277.
45. Id. at 135–36.
46. Id. at 26. See also id. at 146.
47. Arendt cites the biblical story of Sodom and Gomorrah, “which were destroyed by fire from Heaven because all the people in them had become equally guilty.” Id. at 278.
concerned with “what you did, and not with the possible noncriminal nature of your inner life and of your motives or with the criminal potential of those around you.”

Even if it was only misfortune which made you a part of mass murder, you were still a part of it, and are to be punished for this fact. Whatever his individual state of mind, Eichmann had participated in actions which set him beyond the human pale, and it was this fact, which made moral judgment impossible, that permitted his execution:

Just as you supported and carried out a policy of not wanting to share the earth with the Jewish people and the people of a number of other nations . . . we find that no one, that is, no member of the human race, can be expected to want to share the earth with you. This is the reason, and the only reason, you must hang.

It is important to grasp what Arendt is saying here. It is not as a member of the human community that Eichmann must die, but as one whose actions, whatever their subjective moral quality, has made him an outcast, a general enemy of humanity (hostis generis humani). This rationale draws upon and reflects how the Nazis had treated the Jews, and throws it back on Eichmann himself. They had labeled their victims as unworthy of normal human consideration, and Eichmann’s punishment returns the compliment. Like the crime, the punishment must step outside the terms of a common humanity, grounded in the possibility of common moral values and responses, judgments and responsibilities, in order to hang Eichmann. These normal conditions of morality and law are lost where a person reveals that he cannot be reached on a common ground of right and wrong, and this was the position of Nazis like Eichmann.

C. Postscript: Justice Revisited

These concerns in the last four pages of the epilogue anticipate earlier passages in the work, yet are rather strange to encounter in the light of its main argument concerning an international penal code. They plainly

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48. Id.
49. Id. at 279.
50. Id. at 276.
51. This state of mind was commonly observed at trials of former Nazis. See Arendt, supra note 26.
52. Arendt, supra note 6, at 26, ch. 8.
stayed with her, because it was to just these concerns that she returned in the postscript to *Eichmann* two years later, at greater length but with no less ambivalence. She addresses the problem here in terms of what I have called its subjective and objective dimensions, beginning with the former and drawing upon her analysis of totalitarianism and its effect on human subjectivity. This then leads her into consideration of the impossibility of valid legal judgment in a morally bad polity, where a community breaks away from a common sense of right and wrong. She wrestles with and against these problems without resolving them.

As regards Eichmann’s subjective position, Arendt says that he was not an intrinsically “bad man”: no Iago, Macbeth or Richard III. Other than personal ambition, he had no real motives at all. It was “sheer thoughtlessness . . . that predisposed him to become one of the greatest criminals of that period,” but this is precisely what is troubling about him, and leads to the question of “what kind of crime is actually involved here.” Whereas previously, Arendt had portrayed the Holocaust as involving a new kind of crime, now she indicates that “massacres of whole peoples are not unprecedented” either in antiquity or the present world of “administrative massacres” and the “automated economy.” What she points to, introducing ideas from her *Origins of Totalitarianism*, is a systemic genocidal tendency (her version, I would suggest, of Hegel’s “slaughter-bench”) in modern human affairs of which Nazism is one stark example. It is such propensities that challenge our modern moral and legal concepts, and that are “very difficult to grasp juridically.”

Take the idea, put forward by the defense in Eichmann, that he was just a cog in a machine. Arendt confesses that she attached no importance to this idea at the time of the trial, because “the whole cog theory is legally pointless.” In a trial, “all the cogs in the machinery, no matter how insignificant, are in court forthwith transformed back into perpetrators, that is to say, into human beings.” For a criminal to claim to have been a cog is as if he “pointed to the statistics on crime . . . and declared that he

53. Id. at 287.
54. Id. at 288. Others such as David Cesarani have contested this view of Eichmann. But see supra note 23; infra note 60.
55. Arendt, supra note 24.
56. Arendt returned to this issue. See Hannah Arendt, Personal Responsibility under Dictatorship, in Arendt, supra note 26, at 17.
only did what was statistically expected of him.”57 However, the cog theory remains essential to political scientists for whom it is the essence of totalitarian government, and of bureaucracy, “to make functionaries and mere cogs . . . out of men, and thus to dehumanise them.”58 Thus there is a gap between the understanding of lawyers and that of social scientists. Here, Arendt displays an ambivalence about the workings of social theory and its relation to law. On one hand, she is in her own work committed to understanding the effects of bureaucracy and totalitarianism on human actions, and therefore sees law as outmoded under modern conditions. On the other, she draws back from the conclusions to which her own understanding takes her. In the following passage, she hedges her bets.

True, we have become very much accustomed by modern psychology and sociology, not to speak of modern bureaucracy, to explaining away the responsibility of the doer for his deed in terms of this or that kind of determinism. Whether such deeper explanations of human actions are right or wrong is debatable. But what is not debatable is that no judicial procedure would be possible. . . . and that the administration of justice, measured by such theories, is an extremely unmodern, not to say outmoded, institution. When Hitler said that a day would come in Germany when it would be considered a “disgrace” to be a jurist, he was speaking with utter consistency of his dream of a perfect bureaucracy.59

Plainly, Arendt is no supporter of the effects of bureaucracy on conceptions of responsibility, but her defense of legal responsibility is cast in functionalist rather than normative terms: “this is how law in fact works,” and the question of law’s historical possibility under modern conditions is left hanging. The implication is that, while she might have initially dismissed the cog theory promoted by the defense, her own thinking on modern totalitarianism and its effects on ethics have made it more compelling than she might now care to think when considering Eichmann.60

57. Arendt, supra note 6, at 289.
58. Id.
59. Id. at 290.
60. Cesarani criticizes the cog theory and its relationship to an underlying theory of totalitarianism as overly abstract and general, and as failing to see the specifically anti-Semitic, fanatical, engaged quality of Eichmann’s actions. Cesarani, supra note 23, at 351–56. While I agree with his comments, I think that the two linked theories nonetheless have something to say about the systemic nature of modern genocidal violence, and the challenge it poses
As regards the objective moral dimension of a community of judgment, Arendt considers two ways in which criminal law fails to deal morally with problems in a polity that has abandoned a common sense of right and wrong. These concern “acts of state” and “superior orders.” Both examples point to the problem of legal-moral justice in a state based upon the systematic acceptance of morally wrong acts. “Acts of state” are discussed by Arendt as those emergency measures which suspend normal law in order to protect the overall conditions for law. They are regarded as necessary but abnormal exceptions to the rule of law in a normal political system, and are therefore not subject to legal penalty. They represent potentially criminal acts that are not punished, and the liberal state can comprehend such acts as wrong, but permissible exceptions in the circumstances. For a criminal state, whose normal acts are essentially wrong, this kind of thinking does not work. Here, the exceptional act in concession to an overriding necessity becomes the noncriminal act: not the bad act rendered permissible, but the good act which needs no doctrine of permissible exception to excuse it.61

Things are morally turned upside down also in relation to “superior orders.” In a normal country, a soldier should not obey a manifestly wrong command. Where unlawfulness flies “like a black flag above [an order], as a warning reading, ‘Prohibited,’”62 any soldier ought to know he was asked to do something wrong. Here the law hinges on the exceptionality of the manifestly wrong command, and the soldier may reject such an order. In the case of Nazi Germany, however, the manifestly wrong commands Eichmann followed were entirely unexceptional, so no clause of manifest
to justice and judgment. He himself concludes his work with reference to the idea of “Everyman as génocidaire.” He writes that “The key to understand Adolf Eichmann lies not in the man, but in the ideas that possessed him, the society in which they flowed freely, the political system that purveyed them, and the circumstances that made them acceptable.” Id. at 367. Against Arendt, he contends that this is not to say that “we are all potential Eichmanns,” but that under the right circumstances, “normal people can and do commit mass murder.” Is this not really Arendt’s point, even if we do not accept her specific theory of totalitarianism, and her rather “affectless” account of the bureaucrat as cog?

61. Arendt gives the example of Himmler’s order in late summer 1944 to halt deportations in the light of the necessities imposed by impending defeat. Arendt, supra note 6, at 291. Under the Nazi regime, this was a criminal act requiring a defense. From a liberal point of view, it was a noncriminal one, requiring no specific exception to be made.

62. Id. at 292.
exceptionality could be triggered. Both illustrations show how a situation of overall wrongfulness interrupts the normal assumption in a liberal polity that the criminal is a wrongdoer who has strayed from the right. Where lawful actions are in themselves wrong, it makes no sense to seek to establish individual exceptions or excuses in favor of rightful actions. The bigger problem is that where the accepted moral compass has been abandoned so radically, it makes little sense to think in terms of what makes “this individual” guilty, another innocent. Where all are systematically implicated in guilt from the start, there is no basis for distinction, and this “demonstrate[s] the inadequacy of the prevailing legal system and of current juridical concepts to deal with the facts of administrative massacre organised by the state apparatus. . . .”

The underlying problem is the loss of an appropriate sense of right and wrong, which leaves the legal concepts stranded:

What we have demanded in these trials, where the defendants had committed “legal” crimes, is that human beings be capable of telling right from wrong even when all they have to guide them is their own judgment, which, moreover, happens to be completely at odds with what they must regard as the unanimous opinion of all those around them. . . . Since the whole of respectable society had. . . . succumbed to Hitler, the moral maxims which determine social behaviour and the religious commandments—“Thou shalt not kill”—which guide conscience had virtually vanished.

63. Id. at 294.

64. Id. at 295 (emphasis added). To this one reviewer has suggested that the failure of community depicted by Arendt is not completely convincing. Conscience had not vanished, for the Nazis were not insane and knew the difference between right and wrong in general. They were simply unable to include Jews in the category of those to whom moral obligations applied. There was a commonality between judge and judged, even if the latter did not share the same moral standpoint with regard to Jews. But this is just Arendt’s point: the Nazis were in many respects quite normal, yet on a crucial, central, issue, they lived in a different moral world. What was perturbing was just the lack of moral commonality on such an issue, given commonality on others (e.g., being kind to pets and small (non-Jewish) children).

A second objection would be to say that such a moral deficit does not remove the moral right of the judge. Many crimes are committed by people who do not agree with the moral values of a community, and sophisticated accounts of the morality of punishment accommodate a dialogical relation in which wrongness is communicated to the morally aberrant. See, e.g., Duff, supra note 16. In such work, there is no need for an ultimate acknowledgment of wrongdoing by individuals for punishment to remain valid. However, a systemic
The radical and systemic evacuation of the morally right removes the possibility of justice. Where right and wrong have been turned upside down, where lies the commonality between judge and judged that makes a finding of guilt possible? Arendt’s final comments reveal her resisting her own conclusion. Having shown the failure of moral and legal judgment in the light of Nazism, she writes disingenuously against “the reluctance evident everywhere to make judgments in terms of individual moral responsibility,”65 and against the view that one can “judge and even . . . condemn . . . trends, or whole groups of people—the larger the better,” but in a way that “distinctions can no longer be made, names no longer named.”66 It is as if, she says, an instinct in matters of judgment should be the last thing to be consulted in such matters, in favor of the view that individuals are not to be held responsible. But her own argument has taken her to just this position. Her complaint against the law, and the moral concepts that track and validate it, is that they are outmoded and can no longer explain how people should be judged. Having argued herself for the difficulty of legal judgment, in both its subjective and objective dimensions, it is hard to know what to make of her argument that, if individual judgment were not possible, “the administration of justice . . . would [never] be possible.”67 Her concluding comment reflects the ambiguity in her position:

[T]he question of individual guilt or innocence, the act of meting our justice to both the defendant and the victim, are the only things at stake in a criminal court. The Eichmann trial was no exception, even though the court here was confronted with a crime it could not find in the lawbooks and with a criminal whose like was unknown in any court, at least prior to the Nuremberg Trials. The present report deals with nothing but the extent to which the court in Jerusalem succeeded in fulfilling the demands of justice.68

As if her own argument had not made the “nothing but” deeply problematic. In the light of her own critique of the possibility of legal justice,
one can read an ironic inflection in this last sentence. To what “extent” could the court fulfill such demands, what did the “demands of justice” on her account entail?

To conclude this section, Benhabib has written of the normative melancholia that informed Arendt’s reflections on justificatory political discourse and its ability to restrain or control politics in the twentieth century. Whether it is the validity of human rights, principles of equality or the obligation to treat with respect, she resists efforts to think foundationally or to offer modern institutions easy legitimacy.69 To this list should be added the question of valid punishment. Of Eichmann in Jerusalem, Benhabib writes that it is “volatile and difficult to decipher” because Eichmann’s treatment became “the prism through which some of the most touching and difficult issues of Arendt’s life and work were refracted.”70 If my reading is right, then the last four pages of the epilogue with the postscript reveal just such a volatility. On one side, Arendt displays a real support for an international penal justice system, while on the other, she pulls the rug from under it. In terms of my two prefatory quotations, she wants to run with Kant and hunt with Hegel. My own view is that so antinomial a view cannot be correct, and that her conclusions, even if reflecting a real problem, cannot be the whole story. In what follows, we will consider Jaspers’s work in the light of the same problems, and see whether it affords any resolution to Arendt’s volatility and melancholia.

IV. JASPERS’S TYPOLOGY AND THE QUESTION OF COLLECTIVE GUILT

“. . . damned and Hegelised Christian-pietist-sanctimonious bilge.”71

I now turn to Jaspers and his fourfold account of guilt in light of the problem of justice and judgment elicited by Arendt. Jaspers, as stated above, identified conceptions of criminal, political, moral, and metaphysical guilt, and I will probe his account for what it says and, as importantly,
does not say about a fifth form, collective guilt. While Jaspers radically limits this in his “official” typology, it has a greater, highly disruptive, role to play in his analysis than he initially allows. This is seen at a pivotal, and “symptomatic,” point in the text where Jaspers, after speaking of an extended role for collective guilt, pulls himself up short: “As a philosopher I now seem to have strayed completely into the realm of feeling and to have abandoned conception.”

What was it about collective guilt that could have driven this austere philosopher to such a pass?

Of this work, Heinrich Blücher wrote to Hannah Arendt that “despite all beauty and nobility, the guilt-brochure of Jaspers is... damned and Hegelised Christian-pietist-sanctimonious bilge.” Purged of vitriol, the criticism is that Jaspers’s analysis evades the true sense of guilt that should fall on the German people. In viewing the effects of his guilt typology and the tension around the idea of collective guilt, I will consider to what extent this was a fair comment. In opening up the issue of collective (and metaphysical) guilt, I will also lay a foundation for returning to the problem of justice and judgment in Arendt.

A. Jaspers’s Typology of Guilt

In considering the four types of guilt, it is important to bear in mind that Jaspers divides them into pairs as they reflect either an “internal” or “external” sense, that is, whether they relate to the “external” legal or political world, or the “inward” demands of conscience and ethics. Criminal guilt is expressed by Jaspers in positivistic terms. It relates to the violation of unequivocal laws established by objective proof. Jurisdiction rests with the criminal court, which in formal proceedings finds the facts and applies the law. Such guilt meets with punishment in which a determination of will is acknowledged, but as a formally free act, and there is no need for the guilty to acknowledge their wrongdoing or the justice of punishment. Criminal guilt is then a matter resolved in foro externo, and the same is true with regard to the second form, political guilt. This is the result of a

72. He limits it to the “external” form of political guilt.
73. Jaspers, supra note 7, at 75.
74. Rabinbach, supra note 74, at 300.
75. Jaspers, supra note 7, at 75.
76. Id. at 33.
state’s misdeeds, and every citizen must accept such consequences as flow from them. If one lives under the order of a state, one bears responsibility even where one did not support it. Every German suffers a political liability for what was done in their name by their leaders. Jurisdiction lies with the power and will of the victor, and liability takes the form of reparation.77 Since we are here in the realm of the political, as Jaspers envisions it, guilt is marked by issues of what it is prudential to demand, and the victor may choose to moderate its requirements in the interests of its governing strategy. Political guilt is “external,” de facto guilt, imposed and suffered through this-worldly processes in accordance with consequential calculation.

Neither of these forms of guilt affects the internal ethical dispositions of the accused. In the third form of moral guilt, however, the individual is morally responsible for all his deeds, and even if these were the result of superior orders, they remain subject to moral judgment. However, jurisdiction is inward, resting with one’s own conscience, or in communion with one’s closest associates: those that know one best and are “lovingly concerned about my soul.”78 Such guilt consequently leads neither to punishment nor to reparation, which are external sanctions, but to insight involving penance and renewal. Such an inner development may have its own effects upon the world, but that is not its point, which is to curate the individual soul. Similarly, metaphysical guilt, the deepest form, represents an intrinsic solidarity amongst people that is felt as an inward responsibility for all the wrongs that occur in the world, regardless of one’s role in promoting them. The consequence of metaphysical guilt is the transformation of human self-consciousness before God, for it constitutes an “indelible sense of guilt.” This leads to “that humility which grows modest before God,” and in this form of guilt, jurisdiction rests with the “supreme being.”79

77. Id. at 30.
78. Id. at 26.
79. Id. From Jaspers’s account, one can identify a number of different but connected meanings of the “metaphysical” as it connects with guilt. They include (1) to live in history and politics; (2) to live in relations of power given to one; (3) to identify but not live by the unconditioned in human relations; (4) to live after a crime, to survive it; (5) the lack of absolute solidarity with the human being as such. These link with (6) the collective guilt of a people; and (7) the common guilt of mankind (original sin). These are addressed by (8) living in relation with God; and (9) reflecting on the way to humble self-purification. The last two clearly reflect the pietism to which Blücher objected. While Jaspers often
1. Metaphysical Guilt

Since it will become the focus of this essay, two initial points on metaphysical guilt should be addressed here, the first concerning Jaspers's reference to God. It was with this fourth form in mind, that, one imagines, Blücher described Jaspers’s “guilt brochure” as no more than “Christian-pietist-sanctimonious bilge,” but Jaspers’s position can be discussed to a significant extent without reference to Christianity or God. Jaspers is pointing to a sense of universal solidarity that is both transcendent and experienced, and that makes all human beings in some way responsible for every injustice in the world. If one fails to do anything one can to prevent a wrong, one is guilty, and even where one could do nothing, the sense of guilt remains. This is the guilt, for example, of the survivor understood as something more than a psychological foible: “That I live after such a thing has happened weighs upon me as indelible guilt.”

This is humankind’s “original sin,” a sense of guilt that accompanies every de facto or “conditional” political order, and consists in the knowledge that a basic relationship of “the unconditional” underlies every such order. In the following passage, Jaspers contrasts moral responsibility, which bridges the conditional and the unconditional, with metaphysical guilt:

Morality is always influenced by mundane purposes. . . . Metaphysical guilt is the lack of absolute solidarity with the human being as such—an indelible claim beyond morally meaningful duty. This solidarity is violated by my presence at a wrong or a crime. It is not enough that I cautiously risk my life to prevent it; if it happens, and if I was there, and if I survive where the other is killed, I know from a voice within myself: I am guilty of being still alive.

There is no doubt a Christian pietist inflection here, but the idea of a universal solidarity per se is not simply a Christian, or even a theistic doctrine. Such a sense of guilt exists even though it is not fully brought out, or brought out at all, in a given order. Indeed, it is of the nature of such.

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80. Id. at 26.
81. Id. at 65.
guilt that it cannot be brought out beyond people's immediate human ties, this is part of what makes it what it is:

Somewhere among men the unconditional prevails—the capacity to live only together or not at all. . . . Therein consists the substance of their being. But that this does not extend to the solidarity of all men, . . . but remains confined to the closest of human ties—therein lies this guilt of us all.82

The second initial point concerns the very idea of metaphysical guilt, which is the hardest to accept in Jaspers’s typology, particularly if we are urged to think “post-metaphysically.”83 It is not possible to develop a full account of what is intrinsically a complexly used and contested term here, and, as I have made clear above, Jaspers is himself rather vague as to its meaning and implications.84 A full settling of terms must await another occasion. For present purposes, I would note three things. The first is that metaphysical conceptions of justice have always proved attractive in terms of understanding guilt, and this is seen in the continuing attraction of guilt theorists to Kant, even if he is sometimes represented in non-metaphysical terms.85 Therefore it may be helpful to explore the work of one frank proponent of a metaphysical conception of guilt here. Second, an emphasis on the metaphysical is observed in much modern critical thought, even where one might not expect to find it. I have in mind here in particular Derrida’s conception of deconstruction as a justice that is itself undeconstructable,86 and his posing of the question of forgiveness as a relation between the unconditional and the conditioned.87 It will indeed be such a conception of the metaphysical that I will draw from Jaspers and align with Derrida and Bhaskar in the final section of this essay. Third, I would note, in anticipation of my conclusion, that Jaspers’s account of metaphysical guilt does offer one way of dealing with the problem of guilt observed by Arendt. Since her position on the impossibility of judgment

82. Id. at 26.
84. See supra note 79.
85. For a representation of Kant as a neo-contractarian philosopher, see Jeffrie G. Murphy, Retribution, Justice and Therapy (1979); see also Norrie, supra note 9, at 41–45.
86. Derrida, Force of Law, supra note 10.
in Eichmann’s case is in my view morally problematic, some benefit of the doubt might be given to a way of addressing it.

2. Metaphysical and Collective Guilt

With these initial points made, Jaspers’s typology can be explored with regard to two further questions. First, how do his categories fit together? Jaspers has in mind a system of structured differentiation, but one which at the same time involves clear distinction. Thus the concepts of guilt are closely connected and manifest elements “the consequences of which appear in the spheres of the other concepts of guilt.” Metaphysical guilt represents the most basic form, then moral, and then criminal and political. If people could free themselves from metaphysical guilt, then “they would be angels, and all the other three concepts of guilt would become immaterial.” However, despite these structured connections, Jaspers wants to draw a clear line between the internal and external forms of guilt. The accused is either “charged from without, by the world, or from within, by his own soul.”

When charged from without, “the charges are meaningful only in regard to crimes and political guilt” leading to punishment and other forms of worldly liability. From within, “the guilty hears himself charged with moral failures and metaphysical weakness.” If these led to crimes or political wrongs, he also hears himself charged with these, but this is his moral and metaphysical sensibility reflecting on what he has done. The criminal and political effects carry no internal ethical charge. Morally, a man “can condemn only himself, not another,” for “No one can morally judge another,” and to refer to another’s guilt is to refer “only to certain acts and modes of behaviour.”

The second question concerns the nature of collective guilt, an issue of major significance at the time Jaspers wrote. What we might call his “official” position is very clear. It is that such guilt can only be relevant to the issue of political liability. All citizens are collectively liable for what their state does, “but the liability is definite and limited, involving neither

88. Jaspers, supra note 7, at 27.
89. Id.
90. Id. at 33.
91. Id.
92. Id.
93. Id.
moral nor metaphysical charges against the individuals. Individuals alone can be guilty of crimes, and the same is true for moral and metaphysical guilt. Collective guilt exists only in the very limited, external, form of political liability, and Jaspers disparages bluntly anyone who would suggest otherwise:

There is no such thing as a people as a whole. . . . One cannot make an individual out of a people. . . . The categorical judgment of a people is always unjust. It presupposes a false substantialization and results in the debasement of the human being as an individual. . . . To pronounce a group criminally, morally or metaphysically guilty is an error akin to the laziness and arrogance of average, uncritical thinking.

We shall see that this was not Jaspers’s last word on collective guilt, and that he effected a significant return to it. Nonetheless, this is his typology, and how he relates the categories. It will be noted that, unlike Arendt, Jaspers clearly identifies a form of guilt that can constitute the basis for a valid criminal charge. But its casting in legal positivist terms involves a very different approach. For Arendt, law was of course distinguished from morality, but that did not mean they should be appraised separately: her account of justice depended on law’s ethical connection. Despite Jaspers’s claim that the metaphysical underlies everything, his splitting of guilt into internal and external forms posits a clear line where Arendt saw a critical relation. We will return to this difference below, once we have probed further Jaspers’s account of collective guilt. My argument will be that his further discussion of this topic is the key to understanding what is problematic in his typology, but ultimately also of finding a way to deal with the problem of justice and judgment identified by Arendt. For, as we will now see, Jaspers found his own position on collective guilt to be problematic.

B. Collective Guilt: A Fifth Form?

Having considered German guilt in the light of his typology, there is a point in the text where Jaspers stops and considers whether his categories permit the substance of guilt to fall through his fingers. Can his distinctions not in fact “be speciously used to get rid of the whole guilt question,” to

94. Id. at 34.
95. Id. at 35–36.
“hide the source and unity” of guilt, “to spirit away what does not suit us?” 96 Take political guilt: it could be said that this only “curtails . . . my material possibilities” 97 and does not affect my inner self. Criminal guilt similarly affects only a few, and not “me.” On these “external” scores, the individual German need not worry too much. What of the “internal” forms of guilt? Moral guilt involves only the jurisdiction of one’s own conscience, and some might say “my conscience is not going to be too hard on me.” 98 Similarly, metaphysical guilt cannot be charged to another and involves a “transmutation” of the soul. This could be seen as the “crazy idea of some philosopher” 99 and dismissed. What worries Jaspers is that, in separating out the different forms of guilt, most people are let off the hook so that the categories are “turned into a trick” 100 for evading the overall moral issue. Somehow, the externalization of political and criminal guilt and the internalization of moral and metaphysical guilt lead to a loss of the overall quality of guilt that the categories should reflect. Such distinctions “hide the source and the unity [and] enable us to spirit away what does not suit us.” 101

In responding to his own concern about where the categories lead, Jaspers finds himself, having radically limited the concept, returning “in the end to the question of collective guilt.” Though his distinctions are, he insists, “correct and meaningful,” something “has been lost in the process” which “in collective guilt is always audible in spite of everything.” 102

In the end, Jaspers adds a fifth “unofficial” (my term) form of guilt to his typology, giving it a validity he had previously denied. What had previously been the province of “the laziness and arrogance of average, uncritical thinking” 103 is now shown to be central to Jaspers’s own thought about

96. Id. at 68.
97. Id.
98. Id.
99. Id.
100. Id.
101. Id.
102. Id. at 69.
103. Id. at 36. In highlighting the role of collective guilt, I do not want to suggest that it is an easy conception to work with. Further thought would need to be given to its meaning and implications than Jaspers provides. Like metaphysical guilt, it is likely to provide a difficult conceptualization. My main aim is to indicate how such a sense, related to metaphysical guilt, is invoked by Jaspers’s own typology. On collective responsibility, see Christopher Kutz, Complicity: Ethics and Law for a Collective Age (2000).
guilt. People live under evolving conditions which determine the moral aspects of a nation's life and which "help to determine individual morality." The individual lives "as a link in [a] chain" and there "is a sort of collective moral guilt in a people's way of life which I share as an individual."\(^{104}\) The world of which the Germans were a part could produce a regime such as the Nazis, and this is a moral fact for which all Germans are responsible.

We . . . feel that we not only share in what is done at present—thus being co-responsible for the deeds of our contemporaries—but in the links of a tradition. We have to bear the guilt of our fathers. That the spiritual conditions of German life provided an opportunity for such a regime is a fact for which all of us are co-responsible. . . .\(^ {105}\)

Reflecting on this collective sense, however, erodes the distinctions between other forms of guilt, so that political liability and moral responsibility entail "no radical separation."\(^ {106}\) This brings out the ultimate, much expanded, significance of metaphysical guilt, which now embraces the whole German people:

By our feelings of collective guilt we feel the entire task of renewing human existence from its origin—the task which is given to all men on earth but which appears more urgently, more perceptibly . . . when its own guilt brings a people face to face with nothingness.\(^ {107}\)

This late efflorescence of metaphysical guilt in his text propels Jaspers into wider speculation, taking him beyond the Germans. “Everywhere people have similar qualities. Everywhere there are violent, criminal, vitally capable minorities apt to seize the reins if occasion offers, and to proceed with brutality.”\(^ {108}\) For this reason, “German guilt is sometimes called the guilt of all: the hidden evil everywhere is jointly guilty of the outbreak of evil in this German place.”\(^ {109}\) He insists that consideration of such “original sin must not become a way to dodge German guilt,”\(^ {110}\) yet it points

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104. Id. at 70.
105. Id. at 73.
106. Id. at 71.
107. Id. at 75.
108. Id. at 93.
109. Id. at 94.
110. Id.
beyond it. Finally, Jaspers ends by retrenching the role of metaphysical guilt in the relation between an individual and his God. After Nazism,

our life remains permitted only to be consumed by a task. The result is modest resignation. In inner action before the transcendent we become aware of being humanly finite and incapable of perfection. Humility comes to be our nature. . . . Purification is the way of man as such.\textsuperscript{111}

At the beginning of this discussion of Jaspers, I mentioned a point of perplexity in Jaspers’s text, where he wrote of the sense that “as a philosopher,” he now seemed “to have strayed completely into the realm of feeling and to have abandoned conception.”\textsuperscript{112} This perplexity comes immediately after he has admitted the further significance of the metaphysical-collective form of guilt for his account. Analytical-philosophical concept formation versus a metaphysical conception of guilt which exceeds all conceptualizations: it is this conflict that leaves him aerated. Jaspers finishes his chapter with a flourish in the direction of the limits of the analytical:

Language fails at this point, and only negatively we may recall that all our distinctions—notwithstanding the fact that we hold them to be true . . . must not become resting places. We must not use them to let matters drop and free ourselves from the pressure under which we continue our path, and which is to ripen what we hold most precious, the eternal essence of our soul.\textsuperscript{113}

In the light of this account of the four forms of guilt and the odd role played by collective-metaphysical guilt within it, I now turn to assess the validity of Jaspers’s argument in the light of the criticism it attracted from Heinrich Blücher. Was this really a self-serving piece of argument on behalf of the German people? In answering this question, we will identify the point at which we can address Arendt’s concern about justice and judgment from the previous sections.

C. Assessing Jaspers

At first sight, Blücher’s judgment on Jaspers may seem grossly unfair. It smacked for him of apologia, yet one of Jaspers’s central concerns is to

\textsuperscript{111} Id. at 113–14.
\textsuperscript{112} Id. at 75.
\textsuperscript{113} Id.
confront the many contemporary forms of evasion he observed around him, and he spends much time so doing.\textsuperscript{114} However, there is an important question as to whether his typology does not provide its own forms of evasion, and the interesting thing, as we have seen, is that Jaspers himself was aware that this could be the case. To begin with, though, we should consider the four forms of guilt within the “official” typology.

The key to understanding Jaspers’s position is to see him both in relation to the rebuilding of Germany after the war, in which he was keen to participate, and as an individual who had lived with a Jewish wife in Germany through the war, in a condition of “internal exile.” He wished both to condemn the past and to help find a path of political and moral reconstruction for Germany after the war. His division of guilt into two spheres, the external and the internal, contributed to this. External forms involved prosecuting a small group of war criminals separated from the mass of people, and accepting the (temporary) fact of war reparations that fell on the Germans whether they liked it or not. They recognize the facts of postwar life and build them into an overall view that will permit Germany to move forward after an initial period of recrimination. The internal forms of guilt could be said to pursue the same aim by different means. Moral and metaphysical guilt become a matter of private individual reflection, not something imposed by legal or political processes. The internal therefore becomes the only place in which general ethical wrongdoing may be contemplated, and at the same time the place where it may be evaded by all who want to “go easy on themselves.” Private forms of guilt depend on individuals possessing a built-in conscience, so that there is no public form of moral debate with which to engage. The overall effect of this split is to permit postwar reconstruction by sideling a few criminals and permitting the rest to resume their lives without thinking too deeply about what they had done.

It is this effect of the split between internal and external forms of guilt that gives Blücher’s criticism its bite. The “hallowed” quality of the representations of moral and metaphysical guilt do have a sanctimonious and falsely pious feel. What rescues Jaspers from the cutting edge of Blücher’s

\textsuperscript{114} Jaspers does so in various places in the two chapters “Differentiation of German Guilt” and “Possible Excuses.” See Jaspers, supra note 7, chs. 4, 5.
criticism is his final resolve not to let distinctions become “resting places,” and his struggle against the apologetic implications of his own argument. It is true that the earlier condemnation of a conception of collective guilt still stands, despite his recourse to it later in the text, so it is his overall ambivalence that blunts Blücher’s charge. Jaspers could not accept the moral soft-pedaling enabled by his own typology. The underlying philosophical problem, however, is that the ambivalence generated by the late acceptance of collective-metaphysical guilt tends not to the perfection of his categories but to their destabilization and reconfiguration. An extended application of metaphysical guilt comes not just to underlie an otherwise differentiated typology in which it plays a limited role, but to suffuse and undermine it. Metaphysical guilt becomes the guilt of all, emergent “in this German place,”\(^\text{115}\) and therefore not something to be sequestered and controlled in “external” legal and political processes, or in self-chosen “internal” dialogues between a person and his or her God or close friends. It is “out there” in the world, and all are obliged to acknowledge their complicity in it. The categories provide no hiding place, so that a notion of collective-metaphysical guilt threatens to destroy the distinctions that lay at the core of Jaspers’s official position, and therefore to undermine its tendency to support a general turn away from the guilt of the past.

On first sight, Arendt and Jaspers appear very different in their thinking. Arendt’s reflections on Eichmann have a reactive, “phenomenological” quality to them, and are far from the systematic philosophy of Jaspers. Yet, Jaspers’s problem with his four forms of guilt can be seen to result from the same issue as concerns Arendt. How is it possible to attribute guilt where a whole people have given themselves over to wrongdoing? Only the concept of collective guilt, informed by an underlying idea of metaphysical guilt, can capture the sense that war guilt lay with the vast

\(^{115}\) Id. at 94. Chris Thornhill has argued that Jaspers’s emphasis on guilt in “this German place” carries with it a politically unpleasant, nationalistic sentiment, making possible an ultimate evasion of fundamental wrongdoing by reference to the idea of “another Germany” that was somehow present and not implicated in what had happened. Chris J. Thornhill, Karl Jaspers: Politics and Metaphysics 175–77 (2002). While I accept this point, I do not think that Jaspers’s resort to a broader sense of metaphysical wrongdoing can be entirely repudiated because of its “German” connotation. It has to be remembered that Jaspers was also keen to point out the universal quality of the metaphysical conception: a sense of wrongdoing that transcends his reference to “this German place.” Besides, what had happened did occur in “this German place”: different inflections operate here.
majority of Germans. Yet in taking this position, the neat typology of forms of guilt, with everything in its appropriate box, disintegrates. It is for this reason that Arendt’s initial epistolary exchange with Jaspers, before she had elaborated her own view, really hit home. Her questioning touched the raw nerve that his own discussion of collective guilt exposed.

Are we then left with Arendt’s own unhappy dilemma: that a valid justice cannot be done to the Nazis, and that all we are left with is the slaughter-bench and victor’s justice? The answer, I will suggest in the next section, is that there may be moral truth in the broad metaphysical conception of justice that Jaspers’s own contradictory positioning forced out of him, against his own logic. It may indicate a way of thinking about our ethical experience (a meta-ethics) of judging egregious wrongdoing, which can at least begin to indicate how, even if history is a slaughter-bench and justice is that of the victor, there still remains an ethically valid charge in processes of international justice.

V. THE VALUE AND DIFFICULTY OF METAPHYSICAL GUILT

“Dialectic . . . the art of thinking the coincidence of distinctions and connections.”

If Jaspers’s typology is brought under threat by extending metaphysical justice, I begin this section by considering its significance for our understanding of Arendt’s problem of justice and judgment over Eichmann. I then move on to think about the implications of thinking in this way for issues of responsibility in international criminal justice contexts. The argument is necessarily sketched and provisional, but I want to note the need to think dialectically about both distinctions and connections in relating an overall metaphysical sense of guilt to the conduct of individuals and groups in particular contexts. The main thrust of this section is, however, general and meta-ethical rather than particular and concretised. It is about a way of seeing, rather than a detailed application of an ethical method, and is, therefore, in the best, or worst, tradition of the philosophy of punishment, “prolegomenal.”

A. The Value of Metaphysical Guilt

If we think about Jaspers’s initial typology, we could treat it as an anticipatory defense to Arendt’s critical questions. A positivistic account of criminal guilt fineses the problem of achieving a community between judge and judged. All that is required is a formally free act contravening an established prohibitory norm (law). But Arendt’s underlying problem remains in place, for the resort to positivism cannot answer the moral questions she raises. We come back to the initial concern in her correspondence with Jaspers that the Nazi crimes “explode the limits of law.” No punishment “is severe enough” and we “are simply not equipped to deal, on a human, political level, with a guilt that is beyond crime.” “But still, there is a difference” between killing your old aunt and building “factories to produce corpses.” The Germans are burdened with “hundreds of thousands of people who cannot be adequately punished.” Criminal justice is never, as legal positivists would like, a matter of simple rule infraction for formally free acts and Nazi crimes make this abundantly clear. They break down the positivistically constructed limits of law. As between Jaspers’s initial typology and Arendt’s criticism, I think Arendt is right.

My suggestion, however, is that what undoes Jaspers in his late revisionism is precisely that which saves Arendt from her rightness and the discomfiting conclusions, the moral melancholia, of her epilogue and postscript. It is the extended form of metaphysical guilt which offers a way of addressing Arendt’s problem. For her, the problem with Eichmann was that he was in so many ways a normal member of a community, yet one with whom no process of judgment could have moral connection. He was both a normal human being and morally beyond the pale, a moral outcast. Punishment should involve a moral communication, but how could you communicate with someone who held his views? In this regard, he was like an animal who had mauled a child, or a sexual psychopath who had committed a terrible crime, though these analogies only take one so far. Precisely what was so chilling about him was that Eichmann was neither of these and remained throughout a competent human being. Worse, nor was his problem an individual one but that of a whole community, of which he was a normal member. Arendt’s answer was, as we have seen, to treat Eichmann as a “general enemy of humanity” (hostis generis humani), but because of his alienation from humanity’s general norms, he could not be punished according to the accepted moral rationale. Punishment could
not be based on individual guilt, but rather on a valid social expunging on
other grounds, a more simple refusal to share the earth. Arendt’s solution
to the problem of how one punishes an Eichmann is to treat him as one
who lacks the full moral capacities of the human being, but this acknowl-
dges the lack of moral community that otherwise makes justice possible.
The moral communication between more or less equally placed human
beings that lies at the core of modern justice is discarded in favor of a con-
descension faute de mieux. Eichmann and his kind appear to extract a bitter
revenge against their judges: they seem to bring them down to their level.

How does Jaspers help us here? His conception of metaphysical guilt
operates not at the level of an actual human community or in the abilities
of particular persons to engage in moral dialogue. It may do, but it does
not have to: the metaphysical element in being human operates through
people but also beyond them. Jaspers describes it as a solidarity that makes
each person “co-responsible for every wrong and every injustice in the
world,”¹¹⁸ and he says that this is especially so for crimes committed in our
presence or knowledge. The “especially” indicates that the responsibility
operates also despite our presence or knowledge. It operates, for example,
in our sharing in the “links of tradition” so that we “have to bear the guilt
of our fathers” for the “spiritual conditions of German life.”¹¹⁹ The essence
of metaphysical responsibility does not lie in what we do or know, but in
the relation between what we do and know and what lies beyond our acts
and knowledge, in the broader world of which we are a part. It relates to
the existence of an unconditional relation between all human beings: that
“somewhere among men the unconditioned prevails—the capacity to live
only together or not at all.”¹²⁰

The need for such a transcendent ethical quality, I suggest, lies at the back
of Arendt’s dilemma as regards Eichmann. On one hand, she cannot recon-
cile punishment with a modern sense of justice; on the other, she is morally
convinced of the need for punishment. The problem is that her analysis of

¹¹⁹. Id. at 73. An interesting analysis of Jaspers’s idea of collective responsibility in rela-
tion to restorative justice and reconciliation is provided by Andrew Schaap. See Andrew
Schaap, Guilty Subjects and Political Responsibility: Arendt, Jaspers and the Resonance of
community and judgment is too “empirical,” too linked to the actual views of the judge and (especially) the judged. It lacks a sense of the metaphysical and transcendent that lies, albeit uncomfortably, at the core of Jaspers’s work. Eichmann and those like him, regardless of their own views on the matter, owed a responsibility to the idea of the human, so that their punishment does not cease to be ethical because they cannot or will not acknowledge the wrong they have done. Their punishment rather operates as an invocation of how much their conduct failed to relate to a sense of the unconditional relation between human beings, what they owe to each other, regardless of their own sentiments in the matter. It maintains its validity even if they cannot see it, for the conditional possibility of dialogue within an actual community is a manifestation of an underlying unconditional metaphysical relation, rather than a necessary condition of judgment per se.121

121. At the end of her life, Arendt was moving in a direction similar to the one I have drawn from Jaspers. Compare his argument with the position Arendt draws from Kant in the posthumously published Lectures on Kant’s Political Philosophy, where she writes that “One judges always as a member of a community, guided by one’s community sense, one’s sensus communis. But in the last analysis, one is a member of a world community by the sheer fact of being human. . . . When one judges and when one acts in political matters, one is supposed to take one’s bearings from the idea, not the actuality, of being a world citizen and, therefore, also a Weltbetrachter, a world spectator.” Hannah Arendt, Lectures on Kant’s Political Philosophy 75–76 (Ronald Beiner ed., 1992) (emphasis added). This development helps answer a question raised by a reviewer of this article: can Jaspers provide a solution to Arendt’s problem? She pays attention after all to the historical fact of German moral blindness in Eichmann, and would therefore not be persuaded by the idea of an unconditional relation between human beings operating “behind the back” of their subjectivities. In what sense could my argument therefore claim to involve an immanent critique of Arendt, supra p. 191, one that is authentic to her own questions, rather than an “external” one? There are two reasons why this is an immanent critique. The first comes from the dilemma that she finds herself in as between her support for an international penal court and her denial of the possibility of such a court doing justice to the likes of Eichmann. This requires of her a move beyond the historical or “empirical” description of the moral position of someone like Eichmann. The second reason is that she herself senses the need to think in more unconditional terms, for example in her rejection, without good ground, of the “cog theory” in favor of legal judgment in the postscript, or in her suggestion that Eichmann’s failure is in terms of not “think[ing] from the standpoint of someone else,” or that people who opposed the Nazis had to “judge freely.” Arendt, supra note 6, at 295. These comments reveal her working away from the impasse in her analysis engendered by her reliance on the actual subjectivities of people like Eichmann under modern historical conditions towards broader ethical premises. She experiences the need, indeed, immanent in her own work, to move in a direction that turns out to be not dissimilar to Jaspers, so that he is not an “alien” imposition on her thought from outside.
B. A Difficult Solution: Distinctions and Connections

The above argument is limited in what it achieves, indicating no more than that a way of dealing with Arendt’s “actual” or “empirical” problem may be to have resort to Jaspers’s “ideal” metaphysical ethics, to press on the ideal in the relation between the ideal and the actual in modern punishment theory.122 Another way of putting this is to speak of the relation between the conditional and the unconditioned, a relation which, as I have said, is reflected in modern critical thinking associated with Derrida, and also with the dialectical tradition. In effect, the relationship between the unconditional and the conditioned involves thinking immanently, critically, or deconstructively about justice, and what justice relations disclose.123 Though such ways of thinking are in many ways distinguishable, they also have much in common, giving rise to a common problematic in which it becomes necessary and possible to think the relationship between the ideal and the actual in a particular way. In particular, it becomes possible to think of the limits of any particular concept, and necessary to think about how distinctions between connected phenomena and connections between disparate phenomena are conceived.

These are two sides of the same coin. As regards distinctions, a metaphysical sense of responsibility that lies everywhere may be a necessary, but cannot be a sufficient, condition of guilt, for it is over-inclusive. In Jaspers’s account it makes sense to speak of the responsibility of a whole people and of future generations, but this cannot be at the cost of not also differentiating varieties of guilt within the whole. Otherwise, it hardly permits us to distinguish degrees of responsibility, so that by itself, it would not, for example, make any particular distinction between an Eichmann and a boy foot soldier at the end of the war. Both would be members of the Nazi war machine, both would share a sense of responsibility for the whole, yet they

122. See Norrie, Simulacra of Morality, supra note 10; Norrie, Law and the Beautiful Soul, supra note 9, ch. 10.

123. I have argued elsewhere that the distance between dialectics and deconstruction is not so great as is sometimes thought, Derrida himself having a much more ambivalent attitude to Hegel than is often allowed. More boldly, there is a good argument for locating deconstruction within a broad conceptualization of dialectic that is not limited to Hegelian thinking, while recognizing the specifically Hegelian link to deconstruction. See Norrie, Law and the Beautiful Soul, supra note 9, ch.8; Hegel After Derrida (Stuart Barnett ed., 1998). This argument draws upon the work of Roy Bhaskar. See Bhaskar, supra note 10.
would stand differently in relation to it. To identify a general metaphysical
sense of responsibility does not lead to a lesser need to distinguish cases, but
it does sensitize us to the limits of the distinctions we make, and the underly-
ing connections of which we should not lose sight. It requires us to examine
distinctions in terms of their limits, and to think beyond, and critically
about them: what do they exclude, and how validly do they do it? The crit-
icism of Jaspers's typology, his own criticism, is a kind of auto-critique or
self-deconstruction in the face of an historical position. From that point
on, there is a need to re-interrogate the results of his own categories, and to
consider their validity. How could or should criminal responsibility for the
Nazi war machine be recalibrated in the light of the broader underpinning
established by metaphysical concerns? In return how should the metaphys-
ical be shaped to deal with the conditional world it informs? At present, all
that the above argument establishes is that a metaphysical grounding asserts
that there may be an ethical ground for responsibility where actors would
deny it, but it does not in itself disclose what this might mean in practice.

If the general effect of such an approach is to problematize our distinc-
tions in the light of the connections they disclose, it generates a "difficult"
conception of ethical judgment, one which has parallels with Jacques
Derrida's ethics of forgiveness. Derrida considers the philosophy of decon-
struction as involving unconditional standing in relation to a conditioned
world. As he notes, such a bipolarity of standpoint inevitably leaves a gap
which individual acts of judgment must fill. Here is Derrida speaking
about a matter close to that discussed by Arendt and Jaspers, the issue of
forgiveness for historic wrongs, in terms of a double order of an uncondi-
tional justice and a need to decide here and now:

Here is the most difficult moment, the law of the responsible transaction.
According to the situations and according to the moments, the responsibili-
ties to be taken are different. . . . One is never sure of making the just choice;
one never knows, one will never know with what is called knowledge. The
future will give us no more knowledge, because it itself will have been deter-
mined by that choice. It is here that responsibilities are to be re-evaluated at
each moment, according to concrete situations, that is to say, those that do not
wait, those that do not give us time for infinite deliberation. The response . . .
is more than difficult; it is infinitely distressing. It is night. 124

Derrida points here to a sense of the intrinsic difficulty of any differentiation of categories, yet a process of differentiation must occur. It must be said, however, that we do not start with a blank canvas. Justice operates between the conditioned and the unconditional, so it always starts in relation to those categories of judgment already in existence, in this case those categories of liberal criminal jurisprudence with which we are already familiar. Categories such as those of complicity, or of principal and accessory, for example, or of the degrees of responsibility based upon positions in a hierarchy of command remain relevant to a process of differentiation. Specific acts carried out by individuals are also relevant to marking guilt. Just decisions, however, involve a relating of legal categories, which close off decisions about responsibility, to broader moral reflections. Western law is marked by the individualization of responsibilities within social relations, and that is why, when Jaspers came to question the negative consequences of his typology, which starts with law, it was in terms of a collective-metaphysical conception of guilt. Such a conception cannot, I argue, ride roughshod over existing categories, but must remain a necessary, troubling supplement to them.

As regards connections, in the German situation, the process of attributing guilt would not rest content with the criminal identification of the leading few, to the benefit of those many who willingly assumed executive duties in their footsteps, or even to those who were active supporters of Nazism but not the actual agents of atrocities. It would suggest an extended sense of critical engagement with the responsibilities of all those involved at different levels in Nazi Germany. It would, in other words, pursue the implications of Jaspers’s extended notion of metaphysical-collective guilt for the German people, not in the abstract, but in terms of their various activities under the regime. In particular, many ex-Nazis came to hold positions of power, wealth, and influence after the war and were supported by the former allied countries for real-political and economic reasons. If such cases resulted from a failure to apply existing or established law, then the fault is clear. If they resulted from the limits of actually existing legal categories, then a deeper ethical reckoning was in part thwarted by the limits of the law. To argue that such a reckoning became in any

125. Norrie, Punishment, Responsibility and Justice, supra note 9.
case counterproductive after a certain time in terms of the need to rebuild
German society may involve a certain kind of political or strategic truth,
but the underlying ethical issue is not thereby cancelled. The connection
between what was and was not achieved in terms of justice becomes the
ghost at the feast of political and economic recovery in the postwar
world.

Finally, emphasizing connections has a significance beyond the
German context. Generally, it encourages thought about how individual
criminal acts are often systematically organized. It takes us beyond those
who are most obviously perpetrators, and into the webs of power that sus-
tain them. It encourages the problematization of boundaries between dif-
ferent kinds of wrongdoing, and this includes wrongdoing by a judging
community itself. It makes us think about how the commission of egregious acts relates to the process of history that produces them, and it confronts
the issues with which we started this investigation: the nature of justice as
something that is brought about by victors, and of history as, in Hegel's
term, a slaughter-bench. Imagine a world in which country A, an interna-
tional hegemon, sets up a dictator in country B in order to act as a bul-
wark against developments occurring in country C. All goes well until the
dictator starts to get ideas above his station and attacks other countries, at
which point A invades B, deposes the dictator and has him put on trial for
criimes committed when A supported and armed B. In such a situation, an
underlying metaphysical sense of guilt would indicate that it does not stop
with the dictator, his henchmen, and any other leading perpetrators. The
metaphysical conception of guilt would open these kinds of issues to
scrutiny, and for that reason, its justice is no “easy” form. Nonetheless, if
our aim is to consider ethically the quality of the justice that processes of
judgment produce, then these are surely issues relevant to the matter
at hand.

VI. JUSTICE AND THE SLAUGHTER-BENCH

If we now return to my introductory comments about justice and the
slaughter-bench, it will be recalled that Hegel’s philosophy, against the spirit
of my prefatory quote, nonetheless held out hope that the deployment of
reason could provide comfort, in the sense of ethical progress operating
behind the back of history’s manifest forms. International justice, coming
out of the Nuremberg trials, pushing towards an international penal process which now has come into being, could be evidence of just such a progress, and we saw how Arendt, on one side of her thinking, interprets the Eichmann trial as a part of that development. The future ultimately belonged, on this view, to Kant and his hopes for cosmopolitan justice. There is, however, a great temptation in the light of the history of the twentieth and the incipient twenty-first centuries to want to reject Kant and the reassurance of Hegelian Nachdenken, and to look askance at international justice. History really has proved itself to be the slaughter-bench, and everything else is window dressing for those who would wish to be fooled by the justice of victors. Arendt’s views towards the very end of Eichmann in Jerusalem can be cited in support of such an alternative view. In the age of death factories, of imperialism and totalitarianism, of the mass man without a conscience, whole communities giving themselves up to violent depravity, the slaughter-bench has only become the bloodier. Only a sense of biblical judgment can make any sense of the cruelty of human being.

To draw on a phrase used by Robert Fine, what Arendt saw as the defining feature of the twentieth century was the growth of a nihilistic, dehumanized, “spiritless radicalism.” In human affairs, this could produce precisely an Eichmann and millions like him, rendering principles of morality, reason and responsibility, judgment and justice redundant. Given the existence of such a mindset, which lies at the core of Arendt’s thought about modernity, it might be suggested that her endorsement of international criminal justice could only be at loggerheads with this deeper trend. The last pages of the epilogue, and the resumed discussion in the postscript, mark the conflict between tectonic plates in her thinking: a renewed belief in liberal modes of law and reason hitting hard up against her account of spiritless radicalism and its effects.

From my point of view, Arendt’s account of spiritless radicalism is a modern way of describing the evolution of history’s slaughter-bench. Arendt was clear that ways of thinking about ideas must involve an understanding of how they are historically shaped and evolved. Spiritless radicalism is the specific form that racist, totalitarian and genocidal ideas took in the twentieth century, but it is important to be clear about the nature of history, and to recognize that its development is not all one way. To

describe modern history as a “slaughter-bench” is to recognize only one aspect, and to ignore those other developments that are equally embedded in our understanding of modernity. For Arendt, new concepts emerge from and evolve out of the world as it itself develops, so that the spatio-temporally emergent fact of wrongs done against humanity at the same time generates the conceptualization of the crime against humanity. The structure of events gives rise to the concept, and this suggests a more complex historical vision than that represented either by the ideas of totalitarianism and spiritless radicalism, or more generally that history represents only the slaughter-bench. Things are not all one way. If one side of modernity is its violence, another side is its assertion of principles of human dignity, of the need for public justice, of a potential for international justice and a cosmopolitan purpose arising within it. Modernity is at once the violence of history and the consciousness of what human beings owe to each other, the coming into being of a metaphysical sense of the universality of human experience in a world of war.128

In the struggle between Kant, Hegel and the slaughter-bench, this formulation might seem to place me on the side of Kant or Hegelian redemption, but my aim is not to defend a Kantian standpoint from which to observe and to judge. Such a standpoint is too one-sided, too obviously prey to the problem of repetition: that we continue to observe and to judge, but the world continues to be barbaric. An act of judgment becomes only the latest in a sequence, while the need to judge conduct and communities never changes, so that judgment is always flawed, becoming at best otiose at worst historically complicit. Its “regulative ideals” never regulate anything. Such a position is not what I aim for. Rather, I am interested in the sense of a historically real world in which splits, antinomies, “broken” forms of justice are the order of the day. Modernity’s reality is that it is a world in which systematic violence and acts and institutions of judgment and justice are both constitutive elements. It is one in which the contradictions between the two elements are “out there,” lived and experienced, in the world. Thus it is that antinomialism is our given historical experience of justice and judgment.129

128. Such a counterposition does not deny that ideas of the universal can themselves be invoked to legitimate the violence of history, but it argues that such uses do not exhaust them.
129. Norrie, Law and the Beautiful Soul, supra note 9, ch.1.
When Arendt spoke of the Eichmann trial as a step towards an international justice, and at the same time reminded herself of the fundamental problems for law to which such justice gave rise, she did no more than reflect the realities of the world. When Jaspers wrote of the limited forms of guilt that he wished to portray as appropriate for the postwar world, he depicted them in a way that he thought appropriate for a particular historical time and place, one that should not, in his view, bear too much responsibility. But a part of him at the same time rebelled against his own categories, giving his work its most interesting—because contradictory—aspect. What appears as a contradiction in both Arendt and Jaspers in fact reflects a process of historical development and emergence in which contradictory elements are brought into play in history itself. Underlying this process, giving a sense of a utopian ethical promise to the world—despite everything—is something like Jaspers’s conception of metaphysical responsibility. Between the ideal and the actual, the unconditional and the conditioned, we are therefore able to hold onto something of the promise and the value of an international criminal justice, but in a way that recognizes its ambiguous, aporetic, broken quality. History may be described as the slaughter-bench, and justice may therefore be viewed as the privilege of the victors, but this is not the whole story.